or foreign corporations a tax of two cents "on each one hundred dollars of face value or fraction thereof." A Connecticut vendor sold in New York to a Connecticut vendee shares in two foreign corporations without paying the tax. He was arrested and brought *habeas corpus*. *Held*, that the writ be dismissed, as the tax is constitutional. *People ex rel. Hatch* v. *Reardon*, U. S. Sup. Ct., Jan. 7, 1907.

For a discussion of this case in a lower court, see 19 HARV. L. REV. 460.

TAXATION — PARTICULAR FORMS OF TAXATION — SUCCESSION TAX ON NON-RESIDENTS' LIFE INSURANCE POLICIES. — A New York statute imposed a succession tax of five per cent on all "property within the state" belonging to a non-resident decedent. A New York corporation issued to a resident of New Jersey a life insurance policy which was always kept in that state. A New Jersey statute required the corporation, as a condition precedent to doing business in that state, to accept service of process on a state official. At the decedent's death the corporation had assets in New Jersey sufficient to satisfy his claim. *Held*, that the policy is not subject to the New York tax. *Matter of Gordon*, 186 N. Y. 471.

Courts are slow to extend general property taxes to life insurance policies because of practical difficulties of computation. *State Board* v. *Holliday*, 150 Ind. 216. This objection obviously does not apply to inheritance taxes; residents' policies are subject to such taxes as creditors' assets. *Matter of Knoedler*, 68 Hun 150; aff. 140 N. Y. 377. New York courts originally recognized a lack of jurisdiction to tax non-residents' policies, wherever deposited. *Matter of Horn*, 39 N. Y. Misc. 133. Whether they have adopted recent federal dicta, allowing the taxation of debts at the debtor's domicile, is yet uncertain. See *Blackstone* v. *Miller*, 188 U. S. 189; 20 HARV. L. REV. 313. A dissenting judge below argues forcefully that they have. See *Matter of Gordon*, 114 N. Y. App. Div. 202. But in the principal case the court points out that the reasoning of the federal dicta does not apply, for the creditor need no longer seek aid from the debtor's state to collect his claim in view of the New Jersey statute. The court is so obviously indisposed to jeopardize the mammoth insurance business of New York that it is idle to speculate on the result in the absence of such legislation. Nor does it intimate what it shall do as to other choses in action, similarly situated, such as annuities or letters of credit. The state regulation of foreign corporations relied on is not peculiar to insurance companies. See BEALE, FOR. CORP., §§ 117, 141–196.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE ASSIGNABILITY OF CONTRACT. — An assignment of a contract is in fact a power of attorney,[1] or the creation of an agency, so that in general any contract that may be performed through an agent and does not in its terms contemplate personal performance may be assigned. Assignments, valid and invalid, may be divided into three broad classes: (*a*) an assignment of a chose in action; (*b*) a power of attorney to perform and to receive performance; (*c*) an assignment of rights coupled with a delegation of duties.[2] Assignments under class (*a*) are generally valid, and the consent or even objection of the debtor is immaterial. For performance to the agent gives a discharge of the debt, and the assignee, being a mere agent, is subject to all the equities good against the assignor,[3] provided the chose in action has not the further quality

[1] See 3 HARV. L. REV. 337, 340.
[2] *Cf.* 18 HARV. L. REV. 23.
[3] Wald's Pollock, Contracts, 3 ed., 222.

of negotiability. In this class may be included by analogy the assignment of rights to be acquired under an existing executory contract.[1] An important exception to class (*a*) is the ordinary contract of agency. or service where personal control over performance is a right of the creditor, for the debtor should not be obliged to submit to the control of a third party. For the same reasons class (*b*) is generally unobjectionable; a power of attorney does not relieve the principal of any liability, but on the contrary he remains as a surety, and if the agent fails to perform, or if performance is unsatisfactory, the creditor may sue the assignor directly.[2] Therefore, if the assignment purports to be a creation of an agency and the act is one which may be performed through an agent, and if no stipulation to the contrary, express or implied, can be found in the contract, the assignee has the legal right to have his performance accepted and paid for at the contract price. The real difficulty is found in class (*c*). It is a familiar principle of agency that an agent may be appointed to pay as well as to collect a debt,[3] but not to owe a debt; *i. e.*, a new debtor cannot be substituted without the assent of the creditor. It follows that an attempt to delegate a duty is void.[4] Moreover, if the attempted assignment includes a renunciation of further liability on the part of the assignor, whether express or necessarily implied, the assignor must be considered to have repudiated his contract and the other party may either rescind or sue for the breach.[5] Ignorance of the assignment cannot prevent the accrual of this right, and on notice any time thereafter the implied offer to a novation may be refused and action brought.

In a much discussed Massachusetts case[6] the defendant, who had bought ice from the plaintiff, became dissatisfied and contracted for ice with the Citizens' Ice Co. Subsequently the plaintiff bought out the business of the Citizens' Co. and delivered ice to the defendant without notifying him of the change until after the delivery and consumption of the ice. The court held that the contract could not be assigned, on the ground that "a man has the right to determine with whom he shall contract"; and that further no quasi-contractual liability was incurred since the plaintiff was inexcusably officious. In a recent article Mr. George P. Costigan, Jr., clearly points out the fundamental difference between selecting a contractor and refusing an assignee of a contract already formed, and concludes that the plaintiff had a right to sue as assignee on the ground that the case falls within class (*b*) above. *The Doctrine of Boston Ice Co.* v. *Potter*, 7 Colum. L. Rev. 32 (January, 1907). It is submitted, however, that the Citizens' Co. by selling out its business manifested an intention to escape further liability, even as surety, — *i. e.*, was attempting a novation, — and that therefore the rules of class (*c*) should apply. It follows that the court was correct in saying that the defendant could have refused to deal with the plaintiff had notice been given.

The further question of recovery on a *quantum meruit* still remains. Mr. Costigan criticises the court's argument on the ground that even if the plaintiff had no legal rights under the contract, he *bona fide* supposed himself to be the assignee and so should not come within the strict Massachusetts rule that recovery is refused in spite of the enrichment of the defendant if the plaintiff was inexcusably officious. It is believed, however, that the plaintiff's mistake was not one of fact but of law, — whether a valid assignment had been made. The knowledge that the defendant did not want to deal with him is a sufficient answer to the plaintiff's claim of *bona fides*:[7] he knew or should have known that on notice the defendant would exercise his rights and rescind. The action was in fact brought on an implied *assumpsit*, and Mr. Costigan agrees that

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[1] Darling *v.* Andrews, 9 Allen (Mass.) 106; see 4 Cyc. 17.

[2] See 2 Am. & Eng. Encyc. 1036.

[3] See Huffcut, Agency, 5.

[4] See Wald's Pollock, Contracts, 3 ed., 295, n. 91.

[5] *Cf.* Arkansas Smelting Co. *v.* Belden Mining Co., 127 U. S. 379. But see Tolhurst *v.* Portland Cement Mfrs., [1903] A. C. 414.

[6] Boston Ice Co. *v.* Potter, 123 Mass. 28.

[7] See Keener, Quasi-Contracts, 360. *Cf.* Boulton *v.* Jones, 2 H. & N. 564.

recovery was properly refused, but on the ground that a quasi-contractual right is essentially equitable, and so should not be allowed when there is an adequate remedy on the express contract. This conclusion may be sound,[1] but on the view here advanced is inapplicable to the case, since the assignee had no rights under the express contract.[2]

SELF-INTEREST AS THE BASIS FOR THE DEVELOPMENT OF THE LAW. — The law's development has been a fertile field of discussion since jurisprudence has been the subject of study and investigation. Whether custom becomes law when recognized by the courts or is binding law before such recognition, it is an acknowledged source of law. Economic changes in the conditions of the times exercise a potent influence on customs and necessarily call forth changes in the law either by direct or by judicial legislation. The forces which accomplish such alterations are discussed in an interesting contribution to recent periodical literature. *The Modern Conception of Animus*, by Brooks Adams, 19 Green Bag 12 (January, 1907).

The writer takes the position that law is not a science in itself, but expresses a resultant of social forces. He maintains that the law is molded by the dominant class exercising its powers for its own self-interest. It is the animus of the actor, he contends, which controls human actions and therefore limits legal responsibility. Consequently, since rules of evidence and definitions control the proof of animus, the dominant class accomplishes its purpose by shaping the rules of evidence. Abstract principles of justice have had little to do with the development of legal principles or procedure. To illustrate, the writer divides the treatment of crime into four periods. First, the period after the Norman invasion exemplifies the influence of the warlike class. Crimes of violence could be proved only by an eyewitness, and the accused could clear himself by combat or the ordeal. Then, for the better suppression of heresy, the church abolished the ordeal, and the jury trial arose. During this period the upper class had the benefit of clergy, besides great influence over the individual jurymen, to protect it. The next period showed the disappearance of castles and body-guards. As a result, a severe criminal code was made to protect the land-owners from marauders. Lastly, this severity was relaxed when the extension of the police system afforded sufficient protection in itself.

The writer has made out a plausible case against the dominant class. While warfare was constant and the state too decentralized to afford any protection, the fighting class held the upper hand and its might was right. But the last period, when punishment of crime became less severe, hardly supports his position. The extreme stand taken violates most modern ideas of the law. Its ultimate object has been expressed as the highest well-being of society.[3] It is the effort of a people to express its idea of right, although that idea may be constantly changing.[4] Surely, unless justice is made a mere hypocritical conception of the dominant class to blind itself and others to its real motives, the writer's view cannot be upheld.

AFFIDAVITS IN ATTACHMENT. II. *Raymond D. Thurber.* 7 Bench & Bar 92.

BRUNSWICK SUCCESSION, THE. *Gordon E. Sherman.* Dealing with the importance of primary treaties between the states of the German Empire in German constitutional law. 16 Yale L. J. 176.

CAPITAL AND CAPITAL STOCK. *Frederick Dwight.* A review of the authorities on the exact meaning of the words as used in statutes. 16 Yale L. J. 161.

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[1] But see Gilbert, etc., Co. *v.* Butler, 146 Mass. 82.

[2] If Mr. Costigan's contention that the plaintiff had rights under the contract is correct, then the defendant's deliberate refusal to pay would be a repudiation of the contract and the plaintiff could sue in *indebitatus assumpsit* for restitution of value, since repudiation amounts to abandonment. See 7 Colum. L. Rev. 47. *Cf.* Keener, Quasi-Contracts, 303.

[3] Holland, Jurisp., 10 ed., 77.

[4] See 18 HARV. L. REV. 272.